admitting oral evidence to vary a written document, and the appellant relies on Section 92 of the Evidence Ordinance which provides that when the terms of a contract have been reduced to writing, no evidence shall be given of the proof of the terms of such contract except the document itself. I was also referred to the case of *S. K. R. S. L. Somasundram Chitty* v. *Lim Ham Kai and others*, (1927) S.S.L.R. p. 64. In that case the three Defendants had signed as joint makers of a Promissory Note. At the trial before Deane J. the second and third defendants were allowed to give evidence that they had signed as sureties only, and as against them the claim was dismissed, the Plaintiff having given time to the 1st Defendant without their knowledge or consent. On appeal this decision was reversed, and in the course of his judgment Sir William Murison says:—

> "Upon these authorities we come to the conclusion that the only evidence admissible to prove that a signatory to a note signed as surety, and not as principal is either evidence to prove that the case comes within one of the provisos to Section 92 (new Section 93) of the Evidence Ordinance, or evidence of surrounding circumstances."

This passage was relied on by respondent's counsel as an authority for the proposition that where fraud is alleged evidence to contradict the express terms of the written document is admissible. I do not however think that this is the effect of the decision. The case decides that it was inadmissible to vary the document by bringing evidence to prove that parties who *prima facie* signed as principals were really sureties. If the defendants wished to rely on any facts which would bring them within any of the provisos to Section 93, such facts would have to be strictly pleaded, and it may be inferred from the report that the necessary allegations were neither made nor established. The present case is the converse and it is inadmissible for the Plaintiff to bring oral evidence that a party who signed as a witness only was really a principal.

This does not mean that the plaintiff could not have availed himself of the provisions of Section 93. On the face of the document the appellant was not liable but the Plaintiff could have framed a different case against him by claiming rectification of the document and/or damages for fraud. If such had been the case the first proviso to Section 93 would have been applicable, and the Plaintiff would not have been precluded from giving the evidence which, as the case was presented, I find to have been inadmissible. It is however an elementary rule of pleading that fraud must always be alleged with full particulars and strictly proved. In the absence of such allegations evidence of fraud, which goes to the root of the contract, is irrelevant and should not have been admitted.

The appeal is accordingly allowed, and the claim against the 2nd Defendant dismissed with costs. The appellant will also be entitled to the costs of the appeal.

Appeal allowed.

Solicitors for the Appellant—*Salt & Co.*

Solicitor for the Respondent—*C. S. Jayaswal.*

[ORIGINAL CIVIL JURISDICTION]
GORDON SMITH, J.
November 12, 1937.

IN RE MARIE LOUISE CAUNTER DECEASED *Ex parte* JOHN DONALDSON CAUNTER AND TWO OTHERS.

[PENANG ORIGINATING SUMMONS No. 126 of 1937]

Trustees Ordinance (Cap. 59), s. 45—Vesting Order — Administrators — Mortgaged property—Long possession—Limitation Ordinance (Cap. 16), s. 25, art. 104—Extinction of mortgagees right to possession.

A transferee by two deeds made in 1906 and 1908 took transfers of two mortgages on a piece of land at Penang to help his brother, the mortgagor. Some time at the end of 1908 the transferee, got into financial difficulties and was made bankrupt. No interest was ever claimed by or paid to the transferee or his Official Assignee in bankruptcy. The transferee died in 1923. The mortgagor also died in 1928 leaving all his property to his widow. Subsequently the widow died intestate leaving her surviving three children, the applicants. The mortgagor was originally in rightful possession and he and his widow and children have successively been in uninterrupted possession of the property since 1905. The applicants as administrators of the widow applied for an order vesting the said land in them in fee simple freed and discharged from the two mortgages and the two subsequent transfers of mortgage.

Held, s. 25 of the Limitation Ordinance was intended to bring our law into line with the English Law and that art. 114 of Part VII of Schedule has become a dead letter. As s. 25 of the Limitation Ordinance extinguishes the right and title of a person at the expiration of 12 years from the time when the mortgagor's right to possession determines to sue for possession of immoveable property previously subsisting within that period the transferee or his assigns had no right of title to found an action for foreclosure.

Re Ena Mohamed Tamby, (1933) S.S.L.R. 73; 1 M.L.J. 128 differentiated.

ORIGINATING SUMMONS.

B. E. Ross for applicants.

N. Raghavan for Registrar the person appointed to represent the estate of the deceased transferee.

The facts and arguments appear sufficiently from the judgment.

Cur. Ad. Vult

GORDON SMITH, J.—Prayers 2 and 3 of this originating summons were adjourned into

Court for argument. Briefly these prayers are for relief as follows:—

(a) An Order vesting Lots 115[1] and 115[2] of Town Subdivision XII, North East District, Penang, in the applicants as Administrators of the deceased, in fee simple and freed and discharged from two statutory mortgages both dated the 18th September 1905 and a subsequent transfer of each such mortgage, dated respectively, the 18th April 1906 and the 19th March 1908; and,

(b) a declaration that the monies secured by such mortgages and transfers, namely $5,000—and $3,000—respectively secured on such lots, are statute barred and that the title of the mortgagee, J. A. Caunter, be extinguished.

The facts, which are not disputed, are as follows.

The applicants are the children and administrators of Marie Louise Caunter deceased, who was the widow of Harry George William Caunter who died on the 1st December 1928, leaving all his property to his widow.

He, H. G. W. Caunter (hereinafter referred to as 'the mortgagor') bought the two lots in question and they were conveyed to him on the 18th September 1905. On the same day he mortgaged them for $5,000—and $3,000—by 1st and 2nd mortgages. These mortgages were taken over by and transferred to his brother J. A. A. Caunter of Rangoon on the 18th April 1906 and the 19th March 1908, respectively. Apparently no interest was at any time, paid to J. A. A. Caunter (hereinafter referred to as the Transferee).

The transferee, apparently got into financial difficulties about the end of 1908 in Rangoon and he was made bankrupt. No interest was ever claimed by or paid to him or his Official Assignee in bankruptcy.

From a bundle of old letters, which have been discovered and produced the transferee appears to have died in Colombo in 1923. This information is contained in a letter from his widow dated the 8th December 1924 at Maymyo, to the mortgagor in Penang. Apparently he had been dead some little time before she was aware of such fact.

Apparently also, there was another brother named George, mentioned in the correspondence and it appears that the transferee took over the two mortgages to help his brother, the mortgagor and his children, and that the transferee regarded himself as a trustee of the mortgage money for the children and intended to hold the property for their benefit. These children are the present applicants.

The Deputy Commissioner of Estate Duties is claiming full duty on the value of the two lots, passing on the death of Mrs. Marie Louise Caunter, on the assumption that the mortgage debts are statute barred. There is an opportunity of selling the property but as the mortgages and transfers are on the Land Register, there is technical difficulty or flaw in the title which must be removed before the applicants can furnish a clear or good title.

Mr. B. E. Ross appeared for the applicants and Mr. Raghavan for the Registrar, who had been appointed by Order of Court to represent the estate of the transferee.

The mortgagor, apparently, had always been and remained in undisturbed and uninterrupted possession of the mortgaged property.

The legal estate was undoubtedly, vested in the transferee and it is not disputed that the rights in respect of the personal covenant for repayment of principal and interest are barred by virtue of art. 101 of the schedule to the Limitation Ordinance (Cap. 16), and similarly, that the right to institute a suit for possession is also barred by art. 104. The period so fixed is 12 years from the date when the Mortgagor's right to possession determined. By reason of the nonpayment of interest, the right of the mortgagor to possession must have determined in 1908, but no steps were then taken nor have any steps ever been taken to disturb this possession. One cannot say therefore, that the mortgagor has acquired any title by adverse possession as such possession has not and never has been adverse.

The difficulty, however, is not either of these articles but article 114 of Part VII of the schedule which provides a period of 60 years from the date the money secured by the mortgage became due, and within which period an action for foreclosure or sale may be brought by the mortgagee.

In this connection, s. 25 of the Ordinance is relevant and reads as follows:—

> "25. At the determination of the period limited by this Ordinance to any person for instituting a suit to recover possession of immoveable property, the right and the title of such person to the immoveable property, for recovery whereof such suit might have been instituted within such period, shall be extinguished.

Prima facie, this section, which was added by an amending ordinance of 1929, is inconsistent with article 114 and it may be that the omission to provide either a saving clause in the section

or to repeal the article, was an over-sight by the Legislature.

In the case of *Ajar* v. *Ahmad*, (1928) S.S.L.R. 30 (decided before this amending law was enacted) Sproule J. said:—

> "My only doubt arises over her right to sue. The policy of our law departs from English principles and refuses to recognize title by adverse long possession. Our Legislature has ever been at pains to omit from the Limitation Ordinance the Indian s. 28 (taken from an English Act) which operates to extinguish rights to property at the determination of the period limited for instituting a suit for possession."

He commented further and adversely on the position of persons holding by adverse long possession, a position which, apparently the Legislature attempted to rectify in some respects by the enactment of the amending Ordinance. That case was, however, one of fraud and a conveyance and mortgage were set aside on that ground and the Register was amended by expunging the entries of the same but Sproule, J. also added that, possibly, the plaintiff might have been entitled to a vesting order under the Trustees Ordinance, as is applied for in the present case.

In the case of *Re Ena Mohamed Tamby deceased*, (1933) S.S.L.R. 73; 1 M.L.J. 128 a case decided after the amending Ordinance had come into force, Terrell J. decided *inter alia* that this s. 25, in the absence of express words, was not retrospective so as to confer a title by adverse possession such possession being specifically in issue in that case.

In the present case no question of adverse possession arises as the mortgagor was originally in rightful possession and he and his widow and children have successively been in uninterrupted possession of the property since 1905 and the position is somewhat similar to that disclosed in originating summons 1930 No. 90 in which Sproule, J. made a declaration that the right of a co-tenant, his heirs, executors, administrators and assigns to an undivided half share in a piece of land was extinguished by s. 25 of the Limitation Ordinance. In this latter case undivided half shares in property had been conveyed to two persons as tenants in common in 1857. One of the co-tenants transferred his ½ share to his wife in 1887 and the latter and her children were apparently in possession and in receipt of the income from the whole of the property and dealt with it as if they were owners of the whole from then onwards. The other co-owner could not be found, nor was any dealing by him with his half share registered.

A somewhat curious case is *Lewis* v. *Flunket*, (1937) 1 Ch. 306.

In this case, the plaintiff had purchased a house of which she was previously the tenant and to enable her to do so borrowed £1,600 from the defendant on mortgage of the house by deed dated 18th March 1921. The mortgage deed and other title deeds were handed over to the defendant. There was only one payment of interest, namely in November 1921 and no other acknowledgment of debt was made. The plaintiff remained in possession and in 1936 wished to raise money on the house, for which purpose she required the title deeds. She demanded these from the defendant who refused to deliver them up, and therefore took action for their return. Farwell, J. in giving judgment for the plaintiff stated:—

> "In my judgment, where a person is in sole possession of property with a title both beneficial and legal which is good against all the world and indefeasible in law and equity *prima facie* that person is entitled to possession of the title deeds of that property."

The defendant was not only barred from suing on the personal covenant by the Limitation Acts but also for the same reason, she could not maintain an action for foreclosure which, for the purpose of the Acts is an action to recover land and the mortgagee's title is extinguished in 12 years after the last payment of interest.

It appears to me that the addition of s. 25 of the amending Ordinance of 1929 was intended to bring our law into line with the English law and I am not concerned with the question of whether it is retrospective or not in the case of adverse or uninterrupted possession. There is no dispute in this respect on the existing facts. In effect the section says that at the expiration of 12 years, the right and title of a person to sue for possession of immoveable property previously subsisting within that period shall be extinguished. What right or title would there be, therefore, on which to found an action for foreclosure, after that period has expired? I can see none and therefore it appears to me that article 114 has become a dead letter.

There will therefore be an order as prayed in prayer 2 but it seems to me unnecessary to make any order on prayer 3.

The costs will be payable by the applicants.

Judgment accordingly.

Solicitors for applicants—

Logan Ross & Samuel.

Solicitors for Registrar—

Raghavan & Co.

[ORIGINAL CIVIL JURISDICTION]

HORNE, J.

June 10, 1938.

AHNA MOONA MUTHURAMAN CHETTIAR (Substituted under Order of Court herein dated 25th October 1935).....Plaintiffs.

vs.

K. N. NAIR & ORS.....Defendants.

[SINGAPORE SUIT No. 600 of 1932]

[SUMMONS IN CHAMBERS No. 359 of 1938].

Practice—Order for payment of judgment debt by instalments—whether operative as a bar to other processes of execution—Civil Procedure Code, 1907, *S.* 665 (*R.S.C. Order* 40 *Rule* 30 (3)).

An order made under S. 665 of the Civil Procedure Code, 1907, corresponding to R. S. C. 0.40 r.30 (3) for payment of the judgment debt by monthly instalments operates as a bar to any other process of execution in respect of the unpaid balance of the judgment debt, and while such an order is in operation and the payments thereunder are being made, a judgment creditor is not entitled to issue a Writ of Seizure and Sale.

SUMMONS IN CHAMBERS.

Chidson, for the plaintiff (respondent).

Menon, for second defendant (applicant).

Cur. Ad. Vult.

HORNE, J.—This is an application by way of Summons in Chambers to set aside a writ of seizure and sale. The applicant is one of the four defendants against whom a judgment was given in 1932, and he was under an order made in 1933 paying instalments of the judgment debt. The original order was applied for under section 658 of the Civil Procedure Code and under section 665, (*ibid*) the Court ordered instalments which have been varied from time to time. Under the order now current the judgment debter is not in default.

The current order has been made under Order 40 rule 30 (3) and the question is whether that instalment order prevents the judgment creditor from having resort to other means of execution in respect of the unpaid balance of the judgment debt.

Such an order as the present instalment order may be enforced in the same manner as a judgment to the same effect 0.40 r.22.

By order 40 r.16 " Every person to whom a sum of money or any costs are payable, shall, as soon as the money or costs are payable, be entitled to sue out one or more writ or writs of seizure and sale subject nevertheless as follows:—

(a) If the judgment or order is for payment within a period therein mentioned, no such writ as aforesaid shall be issued until after the expiration of such period;

(b) The Court or Judge may at any time after the time of giving judgment or making the order stay execution until such time as it or he thinks fit."

The right to sue out the writ depends upon something being payable under the judgment or order and if a time is fixed for payment then by proviso (a) the writ cannot issue until the time expires.

It is useful to compare an instalment order made under Debtors Ordinance and with one made under 0.40 r.30 (3). In the former case it requires statutory authority to keep other forms of execution alive. Section 6 (2) provides that an instalment order under Part 1 of the Debtors Ordinance shall not be a bar to proceedings in execution. But an order under 0.40 r.30 (3) clearly falls within the proviso (a) to 0.40 r.16 and there is no statutory procedure leaving other forms of execution open to the judgment creditor while the instalment order is in force.

It is true that in the laws of the Colony as Mr. Chidson points out there is no similar statutory provision to section 61 of the Execution Act, 1844. But that statute when examined relates to procedure in the same way as Order 40 does. Sections 60, 61 and 62 of that Act should be considered together and do not force me to adopt the view that a statutory prohibition against execution is necessary here. The order for instalments is a judgment and is the enforceable judgment until it is discharged when the original judgment becomes enforceable. The English cases; *Jones* v. *Jenner,* 25 L.J. Ex. 319; *Montgomery* v. *de Bulmes,* (1898) 2 Q.B. 420, and *Woodham Smith* v. *Edwards,* (1908) 2 K.B. 899 appear to establish the principle that where the judgment creditor adopts the procedure of obtaining an instalment order the judgment debtor is protected from execution for more than one instalments in arrear. Where the debtor is poor even on High Court judgments the instalment order is obtained in the County Court, generally in the district where the debtor resides because his means can more easily be ascertained there and because costs of execution are lower. But the principle is the same in whatever Court the judgment is sought to be executed and was adopted in the considered judgment and in *Re a Judgment Debtor,* 51 T.L.R. 524.

The judgment creditor in this case if he thinks a writ of seizure and sale more effective can apply to have the instalment order discharged but while it is in operation and the payments are being made, he is not, on my reading of the appropriate rules in Order 40 entitled to a writ of seizure and sale.

Order accordingly.

Solicitors for the Plaintiff—*Allen & Gledhill.*

Solicitor for the Defendant—*K. P. K. Menon.*